

87-1476

No. ....

Supreme Court, U.S.  
**FILED**

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In The  
**Supreme Court of the United States**

October Term, 1987

— o —  
WILLIAM E. SNEAD, PATRICIA I. SNEAD,  
JOHN S. O'CONNOR and ROBERT RAY MILLER,

*Petitioners,*

v.

THE CITY OF ALBUQUERQUE,  
a municipal corporation,

*Respondent.*

— o —  
**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

— o —  
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## QUESTIONS PRESENTED

1. Whether the District Court erred in holding that Article IX, Section 12 of the New Mexico Constitution does not create an unconstitutional classification by requiring that some otherwise qualified voters must own property in order to vote in general obligation bond elections.

a. Whether the Court erred in holding that a strict scrutiny standard of review did not apply to the constitutional provision and statutes at issue.

b. Whether the Court erred in finding that ownership of property was a legitimate state interest to be served by the classification made by Article IX, Section 12 of the New Mexico Constitution and its enabling statutes.

2. Whether the District Court erred in holding that the challenged statutes did not impose unreasonable burdens on the plaintiffs in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the City justifiably relied on the constitutionality of the voting procedures in issuing and selling the bonds therefore, entitling the City to prospective application of a holding of unconstitutionality (an issue raised but not reached by the Court of Appeals).

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WILLIAM E. SNEAD, PATRICIA I. SNEAD,  
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*Petitioners,*

v.

THE CITY OF ALBUQUERQUE,  
a municipal corporation,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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The petitioners, William E. Snead, Patricia I. Snead, John S. O'Connor and Robert Ray Miller, pray that a writ of certiorari issue to review the opinion and judgment of the Tenth Circuit Court of Appeals of the United States rendered in these proceedings on December 23, 1987.

## OPINIONS BELOW

*Tenth Circuit Court of Appeals:* The unpublished opinion of the Court of Appeals for the Tenth Circuit is set forth herein as Appendix A (pp. 1-10).

*District Court for the District of New Mexico:* The District Court's opinion is reported at 663 F. Supp. 1084 (D.N.M. 1987). The unofficial opinion of the District Court, Honorable John E. Conway, is set forth as Appendix B (pp. 11-22).

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## JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) (1976) to review a decision of the Court of Appeals for the Tenth Circuit entered on December 23, 1987.

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## PROVISIONS INVOLVED

*Title 42 United States Code, Section 1983 (1976)*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.



*New Mexico Constitution, Article IX, § 12*

Sec. 12 [Municipal indebtedness; restrictions.] No city, town or village shall contract any debt except by an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied, and which shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, or at any special election called for such purpose, have been submitted to vote of such qualified electors thereof *as have paid a property tax* therein during the preceding year, and a majority of those voting on the question by ballot deposited in a separate ballot box when voting in a regular election, shall have voted in favor of creating such debt. A proposal which does not receive the required number of votes for adoption at any special election called for that purpose, shall not be resubmitted in any special election within a period of one year. For the purpose, only, of voting on the creation of the debt, any person owning property within the corporate limits of the city, town or village *who has paid a property tax therein* during the preceding year and who is otherwise qualified to vote in the county where such city, town or village is situated shall be a qualified elector. (As amended November 3, 1964.) (emphasis added).

*New Mexico Statutes*

*3-30-1. County constitutes a precinct for purpose of voting on municipal debt; single voting division outside municipality.*

A. For the purpose of voting only on the question of creating a debt of the municipality, all territory within a county in which is situated a municipality holding an election on the question of creating a debt pursuant to Article 9, Section 12 of the constitution of New Mexico is a municipal precinct. All territory in the municipal precinct and not within the boundary of the municipality holding an election on the question of creating a debt shall constitute one voting division to be known as the nonresident voting division.

B. If two or more municipalities situated in the same county hold an election on the same day on the question of creating a debt, the nonresident voting division of each municipality holding an election on the question of creating a debt constitutes a separate and different nonresident voting division for each municipality holding an election on the question of creating a debt and includes the territory within the boundary of any other municipality within the county.

*3-30-2. Nonresident municipal elector; qualifications.*

A "nonresident municipal elector" means any qualified elector who:

A. is registered to vote in the county in which the municipality holding an election on the question of creating a debt is situated;

B. has paid a property tax on property located within the municipality holding an election on the question of creating a debt during the year preceding the election; and

C. has registered with the municipal clerk his intention to vote at the municipal election on the question of creating a municipal debt in the manner provided in Section 3-30-3 NMSA 1978.

*3-30-3. Nonresident municipal elector; manner of registering to vote on question of creating a municipal debt; certificate of eligibility.*

Not more than sixty nor less than fifteen days before the day of a municipal election on the question of creating a debt, any nonresident municipal elector desiring to vote on the question of creating a municipal debt shall file with the municipal clerk a certificate of eligibility which shall be the registration (sic) required of the nonresident municipal elector for voting at a municipal election on the question of creating a debt. The certificate of eligibility shall be in substantially the following form:

I, \_\_\_\_\_, (Last Name, First Name, Middle Name), desire to vote at the municipal election to be held on \_\_\_\_\_ (Insert day of election) and request the county clerk and county treasurer of \_\_\_\_\_ (Insert name of county) to certify that I am a nonresident municipal elector of the \_\_\_\_\_ (Insert name of the municipality).

Signed: \_\_\_\_\_

(Signature of nonresident municipal elector)

I hereby certify that the above named nonresident municipal elector is registered to vote in this county.

Signed: \_\_\_\_\_  
(County Clerk)

I hereby certify that the above named nonresident municipal elector has paid a tax on property within the \_\_\_\_\_ (Insert name of the municipality) during the preceding year to wit on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Signed: \_\_\_\_\_  
(County Treasurer)

*3-30-4. Nonresident polling place; duties of the municipal clerk to register nonresident municipal electors.*

A. In the same manner that polling places are secured for the conduct of a municipal election, the municipal clerk shall provide a polling place within the municipality for nonresident municipal electors desiring to vote on the question of creating a municipal debt. The polling place shall be separate from any other polling place located within the municipality.

B. Not less than five days before the date of an election on the question of creating a municipal debt, the municipal clerk shall place, by name in alphabetical order, all certificates of eligibility filed by nonresident municipal electors in a registration book kept for that purpose. The registration book for nonresident municipal electors shall be delivered to the judge and clerks of the election at the polling place for nonresident municipal electors in the same manner other registration books are delivered to the judges and clerks of the election in the

remaining polling places and the certificates of eligibility shall serve as the registration forms for the nonresident municipal elector desiring to vote on the question of creating a debt.

*3-30-6. Bond election; qualifications of voters; separation of items; time; publication or posting; ballots.*

A. Before bonds are issued, the governing body of the municipality shall submit to a vote of the registered qualified electors of the municipality and the nonresident municipal electors the question of issuing the bonds. The election may be held at the same time as the regular municipal election or at any special election held pursuant to Article 9, Section 12 of the constitution of New Mexico.

B. The governing body of the municipality shall give notice of the time and place of holding the election and the purpose for which the bonds are to be issued. Notice of a bond election shall be given as required in Section 3-8-2 NMSA 1978. A change in the location of a polling place after notice has been given shall not invalidate a bond election.

C. The question shall state the purpose for which the bonds are to be issued and the amount of the issue. If bonds are to be issued for more than one purpose, a separate question shall be submitted to the voter for each purpose to be voted upon. The ballots shall contain words indicating the purpose of the bond issue and a place for a vote "For \_\_\_\_\_ (designate type) bonds" and "Against \_\_\_\_\_ (designate type) bonds" for each bond issue. The ballots shall be deposited in a separate ballot box unless voting machines are used.

## STATEMENT OF THE CASE

This cause of action was brought pursuant to Title 28 U.S.C. § 1331 (1976), Title 42 U.S.C. § 1983 (1976) and 42 U.S.C. § 1988 (1976) and arises out of the commission of unlawful acts and practices by the respondent acting under the color and pretense of the Statutes and Constitution of the State of New Mexico and acting in violation of the Fourteenth Amendment to the United States Constitution. Petitioners requested that the district court adjudge the N.M. Const. Art. IX, § 12 and N.M. Stat. Ann. § 3-30-2, § 3-30-3, and § 3-30-6 (Repl. Pamph. 1984) to be unconstitutional and void. Petitioners further sought injunctive relief based on the respondent's unconstitutional denial of the right to vote by permanently enjoining the defendant from further expenditure of funds obtained by or through the general obligation bonds generated by elections held by the City of Albuquerque on October 4, 1983, and October 8, 1985.

New Mexico's Constitution extends the right to vote in municipal general obligation bond elections to persons residing in the county in which the municipality holding the election is situated. Under the applicable New Mexico statutes such persons are termed "nonresident municipal electors".

The petitioners (plaintiffs and appellants below) are all residents of Bernalillo County. William and Patricia Snead and John S. O'Connor all owned property within Albuquerque's city limits. Therefore, the Sneads and Mr. O'Connor fall within the definition of non-resident municipal electors. Robert Miller owns no property within

the City of Albuquerque and is therefore totally barred from voting.

In October, 1983, the City of Albuquerque held a general obligation bond election. Petitioners Snead and O'Connor attempted to register to vote. The procedures designed by the statute for certifying voter's status as nonresident municipal electors are so cumbersome that the certification process was not completed in time for any of the persons attempting to vote to register.

The election was held. All of the bonds authorized by the 1983 election have been sold and issued.

The City of Albuquerque held another General Obligation Bond Election in October, 1985. The petitioners did not register to vote in that election. The City of Albuquerque knew and its counsel knew at the time of the 1985 election that there was threatened litigation and a question existed concerning the constitutionality of the election procedure.

The complaint was filed on October 16, 1986, and the first amended complaint was filed March 16, 1987. On May 26, 1987, the Honorable John E. Conway held a hearing on the parties' cross motions for summary judgment. The court entered a memorandum opinion granting the City's motion for summary judgment on July 9, 1987. Petitioners appealed to the Tenth Circuit Court of Appeals on August 3, 1987. The Tenth Circuit entered its order affirming the District Court on December 23, 1987.

In affirming the District Court, the Court of Appeals held that:



1. Because nonresidents of a city have no fundamental right to vote in the city's elections, the franchise may constitutionally be extended to some nonresidents and not to others;

2. Because no fundamental right was involved the Court need not apply the strict scrutiny standard of review to the classification or the procedures set out by the enabling statutes;

3. It is constitutionally permissible to prefer property owners in the allocation of votes;

4. The certification procedure for registration as a nonresident municipal elector is rationally related to a legitimate state interest; and

5. The court need not reach the issue of retroactive invalidation because it concludes that the distinction made in voting allocation is constitutional.



### **REASONS FOR ALLOWING THE WRIT**

The Tenth Circuit Court of Appeals decision is untenable under prior Supreme Court opinions for two reasons.

1. The decision permits states to selectively enfranchise special interest groups who have no fundamental right to vote.

The Tenth Circuit acknowledged that the question of whether the franchise may be selectively extended to some nonresidents of the City and not to others is an issue of



first impression. (App. A, p. 5). The holding of the Court of Appeals that the extension of the right to vote does not require strict scrutiny is in conflict with the theory of one-man one-vote and Supreme Court cases regarding general obligation bond election requirements. *Reynolds, et. al. v. Sims, et. al.*, 377 U.S. 533 (1964), *Hill v. Stone, et. al.*, 421 U.S. 289 (1975)

Prior to 1964, New Mexico's Constitution and Statutes limited the right to vote in general obligation bond elections to city residents who paid property tax on city real estate. The current provisions were enacted in 1964. All residents of the municipality are permitted to vote, but only nonresidents who live in the county *and pay property tax* on municipal property are allowed to vote.

By including nonresident property owners in the electorate, the state weights the interests of property owning voters over those of resident nonproperty owners. The result is a dilution of the right to vote among resident nonproperty owners. This court has held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. at 555.

The Tenth Circuit states that because nonresident property owners have no fundamental right to vote in city elections, that the issue should be "stripped of its voting rights attire." (App. A, p. 6). The Tenth Circuit's opinion implies that strict scrutiny is proper only when a fundamental right is wholly prohibited. This court has repeatedly found the Equal Protection Clause of the Fourteenth Amendment to have been violated where one group

is granted greater voting strength than another. *Reynolds v. Sims*, 377 U.S. 533; *Moore, et. al., v. Ogilvie, et. al.*, 394 U.S. 814 (1969).

This Court has also invalidated bond election procedures which geared the weight of the elector's vote to the amount or value of his property *Stewart v. Parish School Board*, 310 F. Supp. 1172 (E.D. La.), aff'd 400 U.S. 884 (1970); *Hill v. Stone*, 421 U.S. 289 (1975).

Under the Texas law, at issue in *Hill v. Stone*, 421 U.S. 289, all local bond elections were conducted under a dual box election system. All persons owning taxable property rendered for taxation voted in one box; all other registered voters put their ballots in a different box. In order for a bond issue to pass, it had to be approved by both a majority vote in the renders' box and in the aggregate of both boxes. The Supreme Court found that the dual box system violated the Equal Protection Clause of the Fourteenth Amendment because it gave greater weight to the votes of the people who voted in the renders' box.

In our case, New Mexico has continued to make a distinction between voters who pay property taxes and those who do not. While the state acknowledges that it cannot legally exclude resident nonproperty owners, it seeks to weight the property owning side of the ballot by adding nonresident property owners as qualified electors.

(2) The Tenth Circuit's determination that protection of the financial interests of property ownership is a legitimate state interest and a "justifiable distinction for voting allocation" contradicts prior Supreme Court decisions.

The city argues that it should be permitted to protect the financial interests of nonresident property owners by "recogniz[ing] the unique situation of real property owners in allocating voting rights." (App. A, p. 6).

The interest sought to be protected by respondent is the same as that advanced by Arizona in *City of Phoenix, et. al. v. Kolodziejski*, 399 U.S. 204 (1970) and by Texas in *Hill v. Stone*, 421 U.S. 289. The Tenth Circuit affirmed the district court's finding that "all owners of property within the municipality whether residents of the City or not, are similarly directly affected." (App. B, p. 19).

This court held, however, in *City of Phoenix v. Kolodziejski*, 399 U.S. 203, and again in *Hill v. Stone*, 421 U.S. 289, that there was no direct impact created by general obligation bonds from which property owners should be protected: "The *Phoenix* case, however, rejected this analysis of the 'direct' imposition of costs on property owners. *Hill v. Stone*, 421 U.S. 289, 299 (1975)."

There must be a compelling state objective to classify voters based on any facts other than age, citizenship, and residence. *Kramer v. Union Free School District No. 15, et. al.*, 395 U.S. 621 (1969). The City has disingenuously characterized the statutes at issue as a residency classification, while admitting that the purpose is to protect the property ownership interest of nonresidents. This clearly contradicts the decisions of this court in *City of Phoenix v. Kolodziejski*, 399 U.S. 204; *Hill v. Stone*, 421 U.S. 289; *Kramer v. Union Free School District*, 395 U.S. 621; *Cipriano v. City of Houma, et. al.*, 395 U.S. 701; and *Harper, et. al. v. Virginia State Board of Elections, et. al.*, 383 U.S. 663.

**CONCLUSION**

For the reasons stated above, petitioners ask the Court to correct a significant and erroneous decision by the Tenth Circuit Court of Appeals and to decide a significant federal question of first impression.

WHEREFORE, Petitioners respectfully request that this honorable court grant this Petition and issue its Writ of Certiorari in the above cause to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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## APPENDIX



APPENDIX "A"

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

WILLIAM E. SNEAD;	)	
PATRICIA I. SNEAD;	)	
ROBERT RAY MILLER;	)	No. 87-2165
JOHN S. O'CONNOR,	)	
	)	(D.C. No. 86-
Plaintiffs-Appellants,	)	1259JC)
	)	(D. N.M.)
v.	)	
	)	(Filed Dec. 23,
CITY OF ALBUQUERQUE,	)	1987)
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT

Before MCKAY, MOORE and BALDOCK, Circuit Judges

Plaintiffs appeal the district court's granting of summary judgment in favor of the defendant City of Albuquerque on plaintiffs' complaint that the City denied them the right to vote, in contravention of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also indirectly challenged the provisions of the New Mexico Constitution and the enabling statute that permitted the City to grant the franchise in such a way as to deny plaintiffs their voting rights. *See* N.M. Const. art. IX, § 12; N.M. Stat. Ann. § 3-30-1.

The New Mexico Constitution grants the right to vote in municipal elections to persons residing in the county in which the municipality is situated if the county resident owns and pays taxes on property within the city limits.

## App. 2

N.M. Const. art. IX § 12. The enabling statute deems the area of the county outside of the city a "nonresident voting division" of the municipal precinct. The municipal precinct, in turn, is coextensive with the geographical area of the county. N.M. Stat. Ann. § 3-30-1(A).

Albuquerque held a general bond election, and permitted all residents of the City to vote. In addition, Albuquerque permitted Bernalillo County residents who owned and paid tax on property in Albuquerque to vote in the bond election. (Although Albuquerque is inside the boundaries of Bernalillo County, the two are not coextensive.) The voters approved the issuance of the bonds. Revenue from the bonds was allocated to the building of the Montano Bridge, which would cross the Rio Grande River and connect Albuquerque and the west side of Bernalillo County.

Plaintiff Robert Miller is a Bernalillo County resident who does not own property within Albuquerque. Plaintiff Miller thus challenged his absolute exclusion from voting.

Plaintiffs William and Patricia Snead and John O'Connor are Bernalillo County residents who own and pay tax on property in Albuquerque. Accordingly, they were qualified to vote in the city election. Although they were qualified to vote, these plaintiffs challenged the certification procedures designed to determine whether they are taxpaying property owners within the City of Albuquerque. The City determines eligibility in part by reference to the tax rolls, which plaintiffs alleged was so cumbersome a process that it effectively denied them their right to vote.



On appeal, plaintiffs make two arguments challenging the constitutionality of the New Mexico system for allocating voting rights in the state's political subdivisions. First, plaintiffs argue that the system creates an unconstitutional classification. Plaintiffs insist that the district court erred in holding that the correct standard of judicial review of the classification was whether the classification "bears a rational relationship toward promoting a legitimate state interest." Plaintiffs urge this court to apply strict judicial scrutiny to this classification. Moreover, even assuming the "rational relationship" test applies, the plaintiffs argue that the district court erred in holding that the "ownership of property was a legitimate state interest to be served by the classification." Second, plaintiffs argue that the complex certification process "impose[d] unreasonable burdens on the plaintiffs in violation of the Equal Protection Clause of the Fourteenth Amendment." Finally, assuming that this court holds that the New Mexico system is unconstitutional, plaintiffs argue that the invalidation of the system should be made retroactive to include the bond election.

In support of their argument that a strict scrutiny level of review applies to the New Mexico system, plaintiffs rely on a line of Supreme Court cases, beginning with *Kramer v. Union Free School District*, 395 U.S. 621 (1969), which adopted and reiterated the view that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age and citizenship cannot stand unless the district or state can demonstrate that the classification serves a compelling state interest." *Hill v. Stone*, 421

U.S. 289, 297 (1975). Under this line of authority, plaintiffs argue that the City must provide a compelling state interest in permitting only County residents who are tax-paying Albuquerque property owners to vote.

In rejecting plaintiffs' argument, the district court relied on *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In *Holt Civic Club*, residents of an unincorporated community on the outskirts of Tuscaloosa protested Alabama's "police jurisdiction" statutes, which extended certain municipal powers outside of city limits without permitting residents outside city limits to vote in municipal elections. These residents were required to pay for some city services, albeit on a reduced scale.

The Supreme Court rejected the plaintiffs' attempt in *Holt Civic Club* to apply the *Kramer* line of cases to their facts. The Court distinguished the prior voting qualification cases from the facts in *Holt Civic Club*.

The challenged statute in each [prior] case denied the franchise to individuals who were physically resident within the geographic boundaries of the governmental entity concerned. See e.g., *Hill v. Stone*, 421 U.S. 289 (1975); . . . *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); . . . cf. *Turner v. Fouche*, 396 U.S. 346 (1970). . . . No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions.

*Holt Civic Club*, 439 U.S. at 68.

The plaintiffs distinguish *Holt Civic Club* by pointing out that in that case, the City of Tuscaloosa did not single out some nonresidents in denying the right to vote. Here,

the City of Albuquerque permits some, but not all non-residents to vote. Thus, plaintiffs argue, once Albuquerque grants the franchise to some County residents, it must grant it to all County residents unless it can give a compelling reason for its classification system.

Whether extending the franchise to some nonresidents of the City, but not to others, is constitutionally permissible is an issue of first impression. Nevertheless, we believe the correct level of judicial scrutiny can be determined by reference to *Holt Civic Club*.

In rejecting plaintiffs' attempt to distinguish *Holt Civic Club* from the one at bar, the district court began with the premise, made clear in that case, that plaintiffs have no inherent constitutionally protected right to vote in the City's elections. Thus, "the mere fact that the New Mexico law extends the right to vote to some nonresidents does not implicate strict scrutiny by this [c]ourt of the provisions. In other words, to implicate the higher standard of review on the basis of a 'fundamental right' requires that the right be guaranteed by the Constitution." *Snead v. City of Albuquerque*, 663 F. Supp. 1084, 1087 (D. N.M. 1987).

Plaintiffs urge this court to hold that by extending the privilege to vote in city elections to some Bernalillo County residents living beyond the municipal boundaries, the City of Albuquerque created a constitutional right to vote in all Bernalillo County residents. Moreover, the plaintiffs also apparently believe that once the constitutional right is thus created, the City can just as easily take the right away, as long as the City treats all County residents equally. We decline to adopt such a flexible approach to

fundamental rights arising under the Constitution. We agree with the district court that a fundamental right must be guaranteed by the Constitution; the fundamental right to vote cannot "change its stripes" through actions taken by the City of Albuquerque.

"Thus stripped of its voting rights attire, the equal protection issue presented" by plaintiffs is whether the New Mexico constitutional and statutory provisions "bear some rational relationship to a legitimate state purpose." *Holt Civic Club*, 439 U.S. at 70 (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)). Plaintiffs argue that even under the "rational relationship" test, the City has not provided a legitimate state interest to support its voting allocation. The City states that the purpose is to allow all property owners the right to vote on issues which may affect them by raising their property taxes. Plaintiffs insist that this purpose is not legitimate.

Plaintiffs rely on *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). In *City of Phoenix*, Phoenix held a referendum election to levy property taxes to service the city's indebtedness. The city permitted only property taxpayers to vote. Phoenix argued that the only unavoidable tax burden would be placed on property owners, because only real property owners could not move beyond the taxing power. Thus, the city concluded that it should be permitted to recognize the unique situation of real property owners in allocating voting rights.

The Supreme Court disagreed. "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution

does not permit weighted voting or the exclusion of otherwise qualified voters from the franchise.” *Id.* at 209. Plaintiffs rely on this language to support their contention that Albuquerque’s preference for property owners in the allocation of votes cannot be justified by a legitimate purpose. In *City of Phoenix*, however, the Court was deciding whether Phoenix had provided a compelling reason for its distinction between two groups of *resident* voters. Plaintiffs once again “put the cart before the horse” in assuming that an important interest alone requires a political subdivision to grant nonresidents the right to vote.

The Supreme Court rejected an argument similar to the one plaintiffs raise here in *Holt Civic Club*. There, the residents of Holt were directly affected by city elections because many of the city’s police powers extended into outlying areas.

Appellants’ argument that extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the franchise proves too much. . . . A city’s decisions inescapably affect individuals living immediately outside its borders. . . . Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than . . . direct regulations. . . . Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about.

*Holt Civic Club*, 439 U.S. at 69. Thus, a city may rationally exclude from voting in a city election even those who have a substantial interest in the outcome.

Plaintiffs argue that Tuscaloosa’s distinguishing between residents and nonresidents is different in kind from

Albuquerque's distinguishing between Bernalillo County residents who own property in Albuquerque and those who do not. Although the City could rationally exclude all County residents, according to plaintiffs' argument, they cannot rationally include property owners and exclude nonproperty owners. Plaintiffs again turn for support to *City of Phoenix*, which held that Phoenix could not discriminate between city residents who owned property and city residents who did not. Plaintiffs analogize their circumstances to those of the resident nonproperty owners in Phoenix. Even under the "rational relationship" level of judicial review, plaintiffs argue, the New Mexico classification system cannot stand.

The district court below saw a distinction between the city residents in *City of Phoenix* and nonproperty owning Bernalillo County residents. "The *Phoenix* [C]ourt recognized the direct impact of a bond obligation on the residents of a municipality. Residents, as residents, will be directly affected by creation of a bond obligation through either increased taxes or increased rents." *Snead*, 663 F. Supp. at 1088. The district court compared the Phoenix residents to Bernalillo County residents who own property within Albuquerque city limits. "Likewise, all owners of property within the municipality, whether residents of the city or not, are similarly directly affected. Increased property taxes become their obligation and, in essence, impose a lien upon their properties within the city limits." *Id.* In contrast, plaintiff Miller, who owns no property in Albuquerque and does not reside there, faces no direct financial impact. Some Bernalillo County residents will suffer some environmental impact from the



building of the Montano Bridge. While this interest may be substantial, it is different in kind from the direct financial impact affecting Albuquerque residents and taxpaying property owners.

In *City of Phoenix*, the Supreme Court reasoned that nonproperty owners who were nonetheless residents of Phoenix had "a significant interest in the facilities to be financed, . . . shar[ed] the property tax burden, and . . . pa[id] other taxes used by the municipality to service its general obligation bonds." *City of Phoenix*, 399 U.S. at 212. In relying on *City of Phoenix*, plaintiffs ignore that the City of Albuquerque is distinguishing between nonresidents who own property in *Albuquerque* and nonresidents who do not, while in *City of Phoenix* the city was distinguishing between two groups who would presumably share the effects of the financial impact of the additional tax burden. Thus plaintiffs' insistence that property ownership is never a justifiable distinction for purposes of voting allocation is misplaced. We agree with the district court that it is constitutionally permissible for Albuquerque to exclude nonresidents who do not own property in Albuquerque from voting in Albuquerque elections.

Plaintiffs William and Patricia Snead and John O'Connor argue that the certification process for determining which County residents own property in Albuquerque is burdensome, and that it denies plaintiffs their right to equal protection of the laws because it creates "unequal burdens on nonresident municipal electors." The district court held that the additional burdens were rationally related to the City's purpose of permitting County residents with a direct financial interest in the outcome of the election to vote. The City identifies its interests as "pre-

venting election fraud" and "insuring that all persons who have a right to vote are allowed to vote."

Plaintiffs argue that "[b]ecause the franchise has been granted to some nonresident voters, the additional qualifications in the statute must be found as necessary to promote a compelling state interest." Plaintiffs assume too much. In distinguishing between resident and nonresident voters, the City of Albuquerque is only required to show that its certification procedure has a rational relationship to a legitimate state purpose. *Holt Civic Club*, 439 U.S. at 70.

The certification process requires that County residents who wish to vote register their intention in the County and obtain certification that they own and have paid taxes in the City of Albuquerque in the preceding year. We agree with the district court that these requirements are rationally related to ensuring that only those entitled to vote are permitted to vote.

Since we conclude that the distinctions Albuquerque makes in its voting allocation are constitutional, we do not reach plaintiffs' argument that the system should be held retroactively invalid.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT  
PER CURIAM

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**APPENDIX "B"**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

WILLIAM E. SNEAD,  
PATRICIA I. SNEAD,  
ROBERT RAY MILLER, and  
JOHN O'CONNOR,

Plaintiffs,

No. CIV  
86-1259 JC

vs.

(Filed June  
9, 1987)

CITY OF ALBUQUERQUE, a  
municipal corporation,

Defendant.

**MEMORANDUM OPINION**

THIS MATTER came on for consideration of Cross Motions for Summary Judgment in the above cause. The Court has reviewed the memoranda submitted by the parties and amicus curiae New Mexico Municipal League, Inc., and has considered the relevant authorities. Oral argument on the motions was heard on May 26, 1987. The Court finds that there are no disputed facts as to any material issues. Being otherwise fully advised in the premises, the Court finds that the Defendant's Motion for Summary Judgment is well taken and will be granted.

Plaintiffs William E. Snead, Patricia I. Snead, and John O'Connor are Bernalillo County residents who own property located within the city of Albuquerque. Plain-

tiff Robert Ray Miller is likewise a resident of Bernalillo County, but he does not own property within the Albuquerque city limits. The Plaintiffs seek a declaration of unconstitutionality as to New Mexico Constitution Article IX, Section 12 and its enabling statutes, New Mexico Statutes Annotated §§ 3-30-2, -3 and -6 (Repl. Pamph. 1984).

Further, the Plaintiffs ask that the Court issue a permanent injunction enjoining the City of Albuquerque from further expenditures of funds obtained by or through the general obligation funds generated by elections held on October 4, 1983 and October 8, 1985. Some of these generated funds are to be used in the Montano bridge project which will provide access over the Rio Grande from the west side of Bernalillo County into Albuquerque.

Originally, Article IX, Section 12 of the New Mexico Constitution permitted only resident taxpayers to vote upon creation of a municipal indebtedness. In 1964, this constitutional provision was amended to extend the right to vote on creation of a municipal debt to any person who owned property within the corporate limits of the municipality who had paid a property tax therein during the preceding year and was otherwise qualified to vote in the county where the municipality was situated. The New Mexico Supreme Court has previously rendered inoperable a constitutional provision requiring that only residents who owned real property were permitted to vote in school bond elections. *Board of Education v. Maloney*, 82 N.M. 167 (1970). Likewise, an enabling state statute which restricted a resident's eligibility to vote to

payment of a property tax on property in the school district for the preceding year was declared unconstitutional. *Prince v. Board of Education*, 88 N.M. 548 (1975). In response to Supreme Court and state court decisions, the enabling statute was amended to eliminate the property tax requirement as to *residents* of the municipality. Compare N.M. Stat. Ann. § 14-29-6 (1953 Compilation) with N.M. Stat. Ann. § 3-30-2 (Repl. Pamph. 1984).

Under the New Mexico enabling statutes, county land which is not within the city limits constitutes one voting division known as the "non-resident voting division." N.M. Stat. Ann. § 3-30-1 (Repl. Pamph. 1984). In order to qualify to vote in a municipal bond election, an individual residing within the non-resident voting division must 1) be registered to vote in the county in which the municipality is holding an election on the question of creating a debt is situated, 2) have paid a property tax on property located within the municipality during the year preceding the election and 3) have registered with the municipal clerk his intention to vote at the municipal election in the manner provided in Section 3-30-3. N.M. Stat. Ann. § 3-30-2 (Repl. Pamph. 1984).

Plaintiff Miller contends that this statute creates a classification based upon payment of property taxes which violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. In other words, Miller asserts that having extended the vote to some county residents, the state must extend the right to all county residents unless the classification serves a compelling state interest. The Sneads and O'Connor contend that the requirement of and procedures for registering their intention to vote are burdensome requirements which

serve no compelling state interest. The Plaintiffs have urged the Court to apply strict scrutiny to these New Mexico provisions because voting is involved.

At first glance, the Supreme Court decisions appear to support the Plaintiffs' position regarding the applicable standard for analysis. Upon closer inspection, however, it is the rationale used by the Court which leads me to believe that the strict scrutiny analysis used in *Kramer v. Union Free School District*, 395 U.S. 621 (1969) and its progeny should not be extended to the unique law at issue here.

In *Kramer*, a New York statute excluded some residents from voting in school elections because they failed to meet additional qualifications beyond age, bona fide residency and citizenship. The Court stated that "if a challenged state statute grants the right to vote to some bona fide *residents* of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.* at 627 (emphasis added). The Court found that the New York statute was not sufficiently tailored to promote the states interest in limiting the franchise only to those people primarily and directly affected by the election's outcome. Because the statute was both over and under inclusive of people who were primarily affected, the strict scrutiny test proved fatal to the legislation.

On the same day as the *Kramer* decision, the Supreme Court struck down a Louisiana law which provided that only property taxpayers had the right to vote in elections called to approve the issuance of revenue bonds by a

municipal utility system. *Cipriano v. City of Houma, et al.*, 395 U.S. 701 (1969). The Court held that a classification which excludes *otherwise qualified* voters who are as substantially affected and as directly interested in the matter voted upon must pass the most exacting standards of review.

The *Cipriano* rationale was extended to provide for strict scrutiny of classifications based upon property ownership in general obligation bond elections. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). In *Phoenix*, the Court found that the differences between the interests of resident property owners and resident non-property owners were not sufficiently substantial to justify excluding the latter from voting. The Court noted that general obligation bond elections are elections of "general interest."

The *Phoenix* court reasoned that although only property tax revenues were to be used for servicing the general obligation bonds, resident non-owners would be equally burdened financially from the issuance of a bond. Owners of property would be burdened by higher taxes while resident non-owners would share the burden in the form of increased rents as landlords passed on the cost of increased taxes. Thus, because city residents would feel the burden either as increased rents or increased taxes, owners and non-owners alike were directly and substantially interested in the outcome of a general obligation bond election.

The above cases represent the basic principle that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot

stand unless the district or State can demonstrate that the classification serves a compelling state interest." *Hill v. Stone, et al.*, 421 U.S. 289, 297 (1975). The City of Albuquerque contends that as to county residents living outside the city limits, the general obligation bond election should be considered one of special interest. If considered as a special interest election, the classification restricting the franchise would be given the minimal level of scrutiny.

Although the arguments of the Defendant City are appealing, the Court feels constrained to find that a general obligation bond issue is a question of general interest. To characterize the same election as a general interest election for residents and a special interest for some non-residents seems a convoluted and unnecessary step to conclude that strict scrutinization of the state provisions at issue is inappropriate.

To require an enhanced justification by the state for its classification of non-residents in this case is to ignore the context in which *Kramer* and its progeny were decided. The *Kramer* line of cases focused upon whether classifications of *residents* that exclude some residents from voting were constitutional. The case at bar asks whether a classification of non-residents can validly exclude some non-residents from voting. The Court agrees with Defendant City of Albuquerque that this is a case of first impression with respect both to its facts and the issues raised by those facts. The Court is unaware of any other state which has adopted a provision similar to the one at issue in this case.

All of the Supreme Court decisions cited above utilized strict scrutiny for classifications which *excluded*



otherwise qualified residents from voting. Here, New Mexico has extended the right to vote to a group who would have no constitutionally enforceable right to participate in the election in question. The Supreme Court has held that one who resides outside of the governmental unit has no fundamental right to vote in its election. *Holt Civic Club, et al. v. City of Tuscaloosa*, 439 U.S. 60 (1978). In *Holt Civic Club*, the Court recognized that:

No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders. *Id.* at 68-69.

The Plaintiffs in *Holt Civic Club* challenged the constitutionality of a "police jurisdiction" statute extending certain municipal powers over some non-residents of the municipality without permitting the non-residents to vote in the municipal election. Utilizing the rational basis standard of review, the Supreme Court held that the affected non-residents were not denied equal protection where they were not permitted to vote in the city's municipal election.

The Court in *Holt Civic Club* rejected the Plaintiffs' contention that the denial of the franchise to them could be justified only by a compelling state interest. The *Kramer* line of cases was found inapposite because no constitutional right to participate in the political processes was involved. Simply because the issue involved voting classifications was insufficient to bring it within the *Kramer* doctrine.

The Plaintiffs in *Holt Civic Club* had argued that they were as substantially and directly affected as the residents of Tuscaloosa by the outcome in the municipal elections. Speaking for the Court, now Chief Justice Rehnquist noted:

A city's decisions inescapably affect individuals living immediately outside its borders. . . . Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by Alabama's police jurisdiction statutes. Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a *constitutional right* to participate in the political processes bringing it about. *Id.* at 69 (emphasis added).

Because the Plaintiffs in this case have no constitutionally protected right to vote in the city's elections, the mere fact that the New Mexico law extends the right to vote to some non-residents does not implicate strict scrutiny by this Court of the provisions. In other words, to implicate the higher standard of review on the basis of a "fundamental right" requires that the right be guaranteed by the Constitution. Moreover, there is no allegation that the New Mexico laws or the drawing of the municipal boundaries invidiously discriminate against a suspect class. The equal protection issue raised by the Plaintiffs "thus stripped of its voting attire" becomes whether the classification of payment of property taxes by non-residents bears a rational relationship toward promoting a legitimate state interest. *See Holt Civic Club*, 439 U.S. at 70.



Under the minimum level of scrutiny, equal protection is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). In this case, the state contends that it has extended the exercise of the franchise to those directly affected by the outcome of the election. Specifically, the state asserts that the non-resident property taxpayers who will be obligated to pay for improvements should be given the opportunity to participate in the creation of the obligation.

The Court must therefore analyze whether the classification rationally limits the extension of the vote to those who are directly affected by the outcome of the election. The *Phoenix* court recognized the direct impact of a bond obligation on the residents of a municipality. Residents, as residents, will be directly affected by creation of a bond obligation through either increased taxes or increased rents. Likewise, all owners of property within the municipality, whether residents of the city or not, are similarly directly affected. Increased property taxes become their obligation and, in essence, impose a lien upon their properties within the city limits.

One who lives outside the city limits and who owns no property within the municipality faces neither higher rents nor higher property taxes as a result of a municipal bond election. Although a municipal bond election decision may significantly affect the environment of some non-resident non-taxpayers, the environmental impact is indirect and not financial. The state has recognized the direct financial interest of non-resident taxpayers. Its

extension of the franchise to them represents a rational relationship to assuring that those who have a direct financial interest will create any bond obligation.

Although *all* individuals who own land within Albuquerque will be obligated by the general obligation bond, New Mexico has chosen to extend the vote only to those landowners who are registered to vote in the county and have paid taxes in the preceding year. Plaintiffs argue that in order to promote the state's interest, all owners of property within the municipality should have been given the franchise.

It is true that these additional qualifications will result in an underinclusive classification of those directly interested in the outcome of the election. Indeed, if strict scrutiny were to apply, these additional qualifications would be insufficiently tailored to promote the state's interest. But, as discussed earlier, these additional qualifications need be only rationally related to the state's legitimate interest in extending the franchise to those whose taxes will be potentially increased while assuring that the voting process runs efficiently and honestly. The Court cannot say that the additional qualifications are " . . . a display of arbitrary power, not an exercise of judgment." *Matthews v. DeCastro*, 429 U.S. 181, 185 (1976). Rather, the additional qualifications will rationally promote this state's other important interest in preventing abuses of the election process.

One case must be distinguished. In *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986), the Third Circuit found a requirement that a candidate for elected position be non-delinquent in his taxes was not rationally

related to any legitimate government interest. In *Deibler*, the asserted state interests allegedly promoted by the non-delinquency requirement were to screen those candidates who did not have the necessary commitment to the well being of the community and to advance public respect for city government. *Id.* at 334.

Neither of these interests are applicable to the case at bar. Rather, the proof of payment of taxes promotes the state's legitimate interest in efficient and honest election process. Because the vote has been extended to non-residents of the city, the city must be able to confirm that those to whom the vote has been extended indeed own property within the city limits. Because the records of ownership are kept with the county clerk, certification of payment of property taxes by the county clerk appears to be a reasonable and perhaps the only available method for such a confirmation. Thus, the proof of tax payment by non-residents is a qualification rationally related to promoting the state's interest in the election process itself.

The Plaintiffs further contend that the classification and additional voting requirements violate the due process clause of the Fourteenth Amendment. As to non-residents who do not pay property taxes within the city, no due process violation has been stated. Quoting the Supreme Court, the Plaintiffs' argument "proceeds from the assumption, earlier shown to be erroneous . . . that they have a right to vote. . . . Their conclusion falls with their premise." *Holt Civic Club*, 439 U.S. at 75.

As to those non-residents who pay city property taxes, the additional burdens and requirements are not

constitutionally defective. The Plaintiffs rely upon the difficulties they encountered in meeting the deadline for registering their intention to vote. As pointed out in the Defendant's brief, these difficulties were not the result of the law itself. Rather it was the misinterpretation of the law by the county treasurer which caused problems. To correct this misinterpretation, Plaintiffs should have sought a writ of mandamus or sought an extension of the deadline for the acceptance of the certificates of intention.

In summary, the Court finds that the operable provisions of New Mexico Constitution Article IX, Section 12 as interpreted by the New Mexico Supreme Court and the classifications and requirements of the enabling statutes for creation of municipal indebtedness rationally promote legitimate state interests. The New Mexico provisions at issue are constitutionally justified. There being no material facts in dispute and the Defendant City of Albuquerque being entitled to judgment as a matter of law, Defendant's Motion for Summary Judgment will be granted.

An Order in accordance with this opinion will be entered.

/s/ John E. Conway  
UNITED STATES  
DISTRICT JUDGE

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